



# *ACSC Quick-Look*

*Catalyst for Air & Space Power Research Dialogue*



## *LOAC: Time for a Reevaluation?*

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The recent Taguba Report on prisoner treatment at the Baghdad Central Confinement Facility (a.k.a., Abu Ghraib Prison), while disturbing to our sensibilities, raises some interesting questions. The obvious one is the double standard brought about by the Law of Armed Conflict (LOAC)—a set of rules adhered to by the United States, few other countries, *and virtually none of our enemies*. While I **DO NOT** advocate a return to the Thirty Years' War custom of burning, raping, and pillaging through an enemy country, perhaps a review of the law and the realities is necessary.

Of course civilians—at least those who behave themselves—should be treated with the utmost courtesy, as should legitimate Prisoners of War. The various Hague and Geneva Conventions provide for this. Enemy “fighters” are another story, as will be treated below. (It is interesting that “fighters” is the currently accepted term, as our opponents seldom behave as “soldiers”).

LOAC's origins can be traced to the post-Treaty of Westphalia period when there arose a general revulsion to the barbarism that had come to characterize European wars. The customary rules embodied in the just war tradition assumed formal trappings in the nineteenth century as western powers attempted to codify just and moral rules to warfare. This was a good idea when combatants shared a similar culture bounded by common moral and ethical values. The twentieth century, however, witnessed a downward slide in acceptance of the laws and customs of war until, today, they are only enforced in a handful of countries that harbor pretensions to “holding the moral high ground.”

Even though many who use violence subscribe to barbarism as a matter of policy, the United States and other western powers continue to apply a one-sided view LOAC for several reasons:

1. “We would want our soldiers/prisoners to be treated that way.” From the Bataan Death March to summary executions in Operation Iraqi Freedom, our enemies mistreat our soldiers and civilian non-combatants no matter how kind we are to theirs. Often if our soldiers are even kept alive it is so they can be paraded before the media for propaganda purposes.
2. “It demonstrates our higher moral purpose (i.e., “civilization”).” Because of our enemies' internal crises of faith, they consider our entire civilization as a target to be destroyed—man, woman and child. Typically, such opponents fear and respect only power and force, and consider any moderation or mercy on our part as confirmation of their doctrines that view our society and its values as weakness.
3. “We get bad world press unless we are squeaky clean.” It is instructive to observe that Americans can be pulled from vehicles, cut up and burned, and hanged from a bridge to the cheers of excited onlookers, and there is no world condemnation whatsoever. On the other hand, some Iraqi prisoners can have their self-esteem damaged by the abusive behavior of a few rogue MPs, and the US is treated as if it operated Gestapo death camps.
4. “It's the right thing to do.” Yes—to a point. There is no argument that when dealing with inoffensive civilians or honorable military adversaries it would be counterproductive to employ wanton cruelty the way our enemies do. We consider ourselves moral and just, and even our opponents should be treated humanely. There is another category of enemy, however, that deserves no such consideration—the terrorist (guerrilla, insurgent, etc.).

Beginning with the Brussels Declaration of 1874, which simply acknowledged the prior existence of customary rules of war, states codified the definition of a “legal” combatant. This has always been viewed as a measure to *protect* civilian populations from indiscriminate actions of troops subjected to illegal military activity. The Third Geneva Convention—Relative to the Treatment of Prisoners of War (12 Aug 1949) extended protected POW status to virtually anyone who fulfills the four customary conditions to be regarded as a legal combatant:

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- *that of being commanded by a person responsible for his subordinates;*
- *that of having a fixed distinctive sign recognizable at a distance;*
- *that of carrying arms openly;*
- *that of conducting their operations in accordance with the laws and customs of war.* [Article 4(A)(2)]

Note that even “un-uniformed” American militia during the Revolution took care to wear a white cockade on their hats so that at musket combat ranges (40-80 yards), the enemy would identify them as soldiers. Also, special operations forces of the United States who have penetrated enemy lines while not in uniform have always fully expected to share the fate of Nathan Hale. Today we face enemies who, as a matter of policy use the civilian population as a camouflage, a shield and a target; are led by shadowy figures in ski masks who have no intention of being accountable; and, recognize no restraint as to the killing of prisoners, innocent men, women and children.

During America’s greatest war, the Civil War, President Abraham Lincoln issued a policy which tempered ethical treatment of civilians and prisoners with harsh measures for what today we would call “illegal combatants.” *General Orders Number 100—Instructions for the Government of Armies of the United States in the Field*, was issued on the 24 April 1863. Among its 157 articles, were provisions for maintaining the effectiveness of the Army in the face of the threat of “illegal combatants.”

**Article 81** does make allowances for “irregular” soldiers: *“Partisans are soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy. If captured, they are entitled to all the privileges of the prisoner of war.”* However, two other categories of “fighters” are treated in quite a different manner.

**Article 82** deals with part-time guerrillas and armed thugs thusly: *“Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.”*

**Article 85** similarly treats the status of persons in occupied territory (such as Iraq would be considered today): *“War-rebels are persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same. If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, government or not. They are not prisoners of war; nor are they if discovered and secured before their conspiracy has matured to an actual rising or armed violence.”*

**Proposals.** Apply historical sanctions against “illegal combatants” to avoid condoning and rewarding their efforts. Put concretely, there is no reason for an “innocent civilian” in a war zone to possess: an automatic weapon, an RPG, an SA-7, hand grenades, or obvious bomb-making material. Such illegal combatants should be accorded the treatment outlined by President Lincoln for the Civil War in General Orders 100.

1. There is a function for a uniform aside from marking Americans as targets. It identifies you as a “soldier” who is accorded certain basic rights and privileges while simultaneously affording protection to civilian non-combatants;
2. Those who reject the customs and usages of war cannot expect to hide behind them. Rather, they should expect to be eliminated with extreme prejudice.

Whether or not such a policy serves as a “deterrent” is of no consequence, although it would probably give pause to opportunists. The main point is to eliminate those who seek to break the rules and live to influence affairs another day. In sum, I think it is admirable that we have a tradition of civilization and restraint that is foreign to many of our enemies, but war changes: tactically, technologically, and doctrinally. In the “future war” in which we find ourselves, the forces of civilization and stability should treat honorable enemies and civilians with the utmost courtesy, but illegal combatants should be shown the wall.

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